IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-653

WILLIAM SWISHER, et al.,

Appellants

v.

DONALD BRADY, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO PROCEED IN FORMA PAUPERIS

Appellees move this Court, pursuant to Rule 53 of the Rules of this Court, for an Order permitting them to proceed in forma pauperis for purposes of filing the attached Motion To Affirm and for all other purposes should this Court set this case down for plenary consideration. In support of this Motion appellees allege the following:

1. At the time appellees instituted this suit in the court below, they applied for and were granted permission to proceed in forma pauperis.

2. Neither appellees nor their families are able to pay for the cost of this appeal and still provide themselves with the necessities of life.

3. Counsel for appellees has been and will continue to represent them without fee.

In further support of this Motion there is attached an affidavit from appellees' counsel and copies of affidavits submitted in support of Motion to Proceed In Forma Pauperis in the court below.

WHEREFORE, it is respectfully requested that the Motion to Proceed in Forma Pauperis be granted.

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Peter S. Smith
Maryland Juvenile Law Clinic
500 W. Baltimore Street
Baltimore, Maryland 21201
Counsel for appellees

AFFIDAVIT

Peter S. Smith being first duly sworn, according to law, states the following:

1. I am an attorney at law and am currently employed as a Professor of Law at the University of Maryland School of Law, Baltimore, Maryland. I am a member in good standing of the Bar of this Court.

2. I am counsel for Donald Brady, Michael A. Epps, James Oliver Love, Phillip Witherspoon, William Beckett, William Campbell, Andre Aldridge, George McLean and Clinton Stewart, who are the appellees in No. 77-653 . I have represented the appellees since the inception of this litigation in the United States District Court for the District of Maryland and am receiving no fee for my services.

3. Because of the financial inability of either the appellees or their parents or guardians to pay any of the fees and costs in connection with this litigation, I submitted to the District Court at the commencement of the litigation, a Motion to Proceed in Forma Pauperis and affidavits executed either by the appellees or their parents or guardians. The Court below granted the Motion to Proceed in Forma Pauperis.

4. To the best of my knowledge and belief, appellees' and their families' financial condition has not sufficiently changed during the course of this litigation to enable them to pay fees and costs. Because many of the appellees and their parents or guardians have no telephones, move with some frequency, and are not readily available for consultation with their counsel, the execution of a new set of affidavits to accompany the attached Motion to Proceed in Forma Pauperis would create significant difficulties for appellees' counsel.

Peter S. Smith

SUBSCRIBED and SWORN to this day of November, 1977.

Notary Public

AFFIDAVIT OF INDIGENCY

DONALD BRADY, first being sworn, deposes and says:

I am a resident of Baltimore City. I am eighteen (18) years of age. I live at home with my mother. I am currently unemployed. I cannot pay the costs of this proceeding and still provide myself or my family with the necessities of life.

Donald Brady
Donald Brady

Subscribed and sworn to this 22nd day of November 1974.

Notary Public

AFFIDAVIT OF INDIGENCY

MICHAEL A. EPPS, first being sworn, deposes and says:

I am a resident of Baltimore City. I am currently unemployed. I live at home with my mother. I cannot pay the costs of this proceeding and still provide myself or my family with the necessities of life. I am eighteen (18) years of age.

Michael A. Epps
Michael A. Epps

Subscribed and sworn to this 20th day of November, 1974.

Notary Public

AFFIDAVIT OF INDIGENCY

JOYCE LOVE, mother of James Oliver Love, first being sworn, deposes and says:

I am a resident of Baltimore City. I work at the Provident Health Center, 907 Edmondson Avenue, Baltimore, Maryland. My net income is approximately $110.00 per week. I have five children and I am the sole means of support for my children and me. My son, James Love, Jr., is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Joyce Love
Joyce Love

Subscribed and sworn to this 19th day of November, 1974.

Shirley M. Agnelt
Notary Public

AFFIDAVIT OF INDIGENCY

ELSIE WITHERSPOON, mother of Phillip Witherspoon, first being sworn, deposes and says:

I am a resident of Baltimore City. I work at the Hedwin Corporation, 1600 Roland Heights Avenue, Baltimore, Maryland. My net income is approximately $84.00 per week. I have three children and I am the sole means of support for my children and me. My son, Phillip Witherspoon, is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Elsie Witherspoon
Elsie Witherspoon

Subscribed and sworn to this 19th day of November, 1974.

Shirley M. Agnelt
Notary Public

AFFIDAVIT OF INDIGENCY

WILLIAM BECKETT, stepfather of Joseph Fenwick, first being sworn, deposes and says:

I am a resident of Baltimore City. I work at the Mace Lumber Company, 1102 N. Fremont Avenue, Baltimore, Maryland. My net income is approximately $150.00 per week. I have six children and I am the sole means of support of my children and me. My stepson, Joseph Fenwick, is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

William L. Beckett
William Beckett

Subscribed and sworn to this 22nd day of November, 1974.

Shirley M. Oppett
Notary Public

AFFIDAVIT OF INDIGENCY

WILLIAM CAMPBELL, father of William L. Campbell being first sworn, deposes and says:

I am a resident of Baltimore City. I work at the Ingleside Plumbing and Heating Company, Inc., 1700 Friendship Street, Baltimore, Maryland. My net income is approximately $120.00 per week. I have five children and I am the sole means of support for myself, my wife and my children. My son William L. Campbell is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

William S. Campbell
William Campbell

Subscribed and sworn to this 20th day of November, 1974.

Shirley M. Oppett
Notary Public

AFFIDAVIT OF INDIGENCY

Ruth Kent, mother of Andre Aldridge, first being sworn, deposes and says:

I am a resident of Baltimore City. I work at School No. 27 200 S. Chester Street, Baltimore, Maryland. My net income is approximately $66.00 per week. I have three children and I am the sole means of support of my children and me. My son, Andre Aldridge is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Ruth Kent
Ruth Kent

Subscribed and sworn to this 19th day of November, 1974.

Notary Public

AFFIDAVIT OF INDIGENCY

MINNIE JOHNSON, mother of George McLean, first being sworn, deposes and says:

I am a resident of Baltimore City. I am unemployed. My net income is approximately $100 per week from the Department of Social Services of Baltimore City. I have eight children and one grandchild and I am the sole means of support for myself, my children and grandchild. My son, George McLean is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Minnie Johnson
Minnie Johnson

Subscribed and sworn to this 19th day of November, 1974.

Notary Public

AFFIDAVIT OF INDIGENCY

HAYNIE STEWART, father of Quinton R. Stewart, first being sworn, deposes and says:

I am a resident of Baltimore City. I am disabled. My wife works at Eastern Products Corp. - Subsidiary of Roper Corporation, 932 S. Snowden River Parkway, Columbia, Maryland 21046. Her net income is approximately $87.00 per week. She is the sole support of myself, and our four children. There is no other income coming in to support the family. My son, Quinton R. Stewart is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Haynie Stewart
Haynie Stewart

Subscribed and sworn to this 10th day of November, 1977.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-653

WILLIAM SWISHER, et al.,

Appellants

v.

DONALD BRADY, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Peter S. Smith

Adrienne E. Volenik

Maryland Juvenile Law Clinic
500 W. Baltimore Street
Baltimore, Maryland 21201

Counsel for Appellees

IN THE

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NO. 77-653

WILLIAM SWISHER, et al.,

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DONALD BRADY, et al.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the District Court for the District of Maryland in the above entitled case be affirmed on the ground that it is manifest that the questions on which the court's decision depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a final judgment entered on September 19, 1977, pursuant to the Memorandum and Order of a District Court of three judges convened under 28 U.S.C., § 2284. The Memorandum and Order, filed on September 16, 1977, and the Judgment are included as attachments A and B, respectfully, infra.

The suit was filed on November 25, 1974 pursuant to 42 U.S.C., § 1983 alleging deprivation of rights protected by the Fifth and Fourteenth Amendments to the United States Constitution. The appellees brought the action on behalf of themselves and other similarly situated persons pursuant to Rule 23, F.R. Civ. P. The thrust of appellees' complaint was that certain provisions of

rules adopted by the highest state court of Maryland and having statewide applicability denied them the right to be free of multiple prosecutions or punishments in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. In particular, appellees claimed that a court rule which permitted them to be tried again by a juvenile court judge at a de novo hearing after they had been found not guilty by a juvenile court master at a trial for precisely the same offense violated Constitutional double jeopardy protections.

Simultaneously with the filing of the § 1983 action which sought declaratory and injunctive relief, appellees filed petitions for writs of habeas corpus in the United States District Court for the District of Maryland. They allege that they had been illegally restrained of their liberty because a juvenile court judge had found them guilty and sentenced them to either probation or incarceration following de novo trials which took place because the State's attorney had excepted to the results of earlier trials in which juvenile court masters had found the appellees to be not guilty.[1] The habeas cases were filed in addition to the § 1983 case because neither action alone could obtain the full relief which the appellees desired. See Preiser v. Rodriguez, 411 U.S. 475 (1973).

1. In the cases of three of the appellees, the habeas corpus petitions were filed prior to the de novo hearings before the judge but following the filing by the State's attorney of exceptions to the juvenile court masters' determinations that the appellees were not guilty. By agreement reached between counsel and the juvenile court, the de novo hearings in those three cases were delayed pending the outcome of the federal court litigation. As a consequence of the federal court's opinion in the habeas corpus cases, the de novo hearings in those three cases never took place, and the court dismissed the habeas petitions of those three without prejudice. See Aldridge v. Dean, 395 F.Supp. 1161, 1173 (D. Md. 1975).

By agreement of the parties, the § 1983 case was held in abeyance pending the decision in the habeas corpus cases. The parties also agreed that all evidence taken in the habeas corpus cases would be included as evidence in the § 1983 case, subject to any rulings by the three-judge court respecting relevancy.[2]

Following the presentation of extensive evidence in the habeas cases, the court rendered an opinion on June 12, 1975, concluding that the de novo trial of appellees pursuant to the court rule under attack violated their double jeopardy rights. Aldridge v. Dean, 395 F.Supp. 1161 (D.Md. 1975). Appropriate orders were entered.

Appellants in the habeas cases[3] took no appeal. Instead, the Court of Appeals of Maryland, which had earlier rejected the identical claims of the unconstitutionality of the court rule, see Matter of Anderson, 272 Md. 85 (1974), cert. denied, 421 U.S. 1000 (1975), immediately proceeded to amend the offending rule.[4] As amended, the rule provided that a request by a State's attorney for a hearing before the juvenile court judge, following the master's hearing and finding of not guilty, would be restricted to a hearing on the record, unless all parties and the judge agreed to supplement the record. Presumably the Maryland Court of Appeals felt that this change would render the offending rule constitutional once again.

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2. The three-judge court did not exclude any of the evidence that had been adduced in the habeas corpus cases. Hence the record in the instant case consists of all evidence taken in both the habeas and three-judge court cases. See the slip opinion of the court below in the instant case, at pp. 3-4.

3. In conformity with normal habeas corpus practice, the appellants in the habeas cases, unlike in the instant case, were the persons having immediate custody of appellees. The same counsel, however, (the Maryland Office of the Attorney General) has handled all of the proceedings for the defendants in the instant case and for the respondents in the habeas corpus cases.

4. The change in the rule took effect one week after the Orders in the habeas corpus cases were entered.

Appellees in the instant case then obtained leave to file a supplemental complaint in the § 1983 suit in which they noted that the offending rule had been amended, but claimed that it was still unconstitutional for the same reasons previously alleged. Appellees further alleged in the supplemental complaint that, effective the same day as the amended rule (July 1, 1975), the juvenile causes statute was amended to include a provision authorizing the State's attorney to request a de novo hearing before the juvenile court judge following a hearing before a master which resulted in a finding of not guilty. See Ann. Code of Md., Cts. & Jud. Proceed. Art., § 3-813(c). Appellees alleged that this new statutory provision violated their double jeopardy rights.[5]

Following the taking of additional evidence, designed mainly to update the record developed at the habeas corpus hearing, the court below rendered its decision, unanimously declaring the offending portions of the rule in question to be unconstitutional and enjoining the appellants from taking further action under those portions of the rule. Notice of Appeal to this Court was filed on October 14, 1977.

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5. Prior to July 1, 1975, the unconstitutional scheme complained of had always been contained exclusively in court rules. Ironically, at the very moment the rule was changed in an effort to avoid the effects of the federal habeas corpus decision, the statute took effect authorizing the precise procedure that the habeas corpus decision declared illegal. Despite the fact that the new statute and the amended rule became effective on the same date, the parties have agreed the rule should prevail since it was approved by the Maryland Court of Appeals after the Governor of Maryland signed the bill incorporating the new statutory provision. See slip opinion of the court below at p. 7. As appellees make clear, infra, decisions of this Court require the same result whether one views the statute or the rule as controlling. In any event, not even the appellants would contend that their case is stronger under the statute than the rule. Thus, if for any reason this Court should conclude that the statute should govern rather than the rule, all of appellees' arguments, as well as the decision of the court below, would apply a fortiorari.

ARGUMENT

The decision of the district court is plainly correct; hence affirmance without plenary consideration is appropriate. Every pertinent issue in this case can be disposed of by responding to three questions: (1) Does the double jeopardy clause of the Fifth Amendment, as made applicable to the states by the Fourteenth Amendment, apply to juvenile court proceedings? (2) If question (1) is answered in the affirmative, can the effect of that answer be avoided by providing that the second trial will be on the record? (3) If double jeopardy principles apply to juvenile court proceedings and they cannot be avoided by making the second trial on the record, does it make any difference that the first trial was held before a judicial officer who is called a master?

The first two questions have been explicitly decided in appellees' favor by decisions of this Court. Appellees acknowledge in their Jurisdictional Statement, at p. 12 , that the first question is decisively answered by Breed v. Jones, 421 U.S. 519 (1975). The second question is just as clearly answered by United States v. Jenkins, 420 U.S. 358 (1975). Indeed, Jenkins, which the Jurisdictional Statement neither cites nor discusses, almost seems to be written to deal with the very procedure that the Court of Appeals of Maryland followed when it rewrote the rule to avoid the effects of the earlier habeas corpus decision in Aldridge v. Dean, supra. As the court below noted, see slip opinion at p. 14, Jenkins explicitly ruled that the double jeopardy clause would be violated even if, at a second hearing, the trial court took no additional evidence. Unlike United States v. Wilson, 420 U.S. 332 (1975), rendered the same day as Jenkins, the hearing on the record which is the subject of the instant dispute necessarily involves the court taking action beyond mere reinstatement of the verdict of the first hearing. Thus the attempt by the Court of Appeals of Maryland in 1975 to avoid the constitutional difficulty by

restricting the second hearing to one on the record wholly fails in light of Jenkins. Moreover, as the court below noted, see slip opinion at p. 14, this Court in Breed noted that the case in the adult court, by stipulation, was submitted "on the transcript on the preliminary hearing." Breed v. Jones 421 U.S. at 525. This Court made no suggestion that double jeopardy principles had no application because Jones' second hearing was on the record.[6]

The only remaining question is whether a different result is required simply because the first hearing is held before the juvenile court master. Admittedly, this precise question has not been before this Court. Nevertheless, appellees submit that the reasoning of Breed v. Jones, although applied here in a slightly different context, so plainly requires the conclusion reached by the court below on this question as to make plenary consideration unnecessary. The whole thrust of the Breed case was to reject the notion that double jeopardy principles could be avoided by the claim that the two hearings simply constituted one continuous proceeding to which jeopardy attached only once. If such notion had no validity in the Breed case, there is no apparent reason why it should have validity simply because a master presides at one of the two hearings. The whole purpose of the extensive evidentiary hearings in the court below was to remove any doubt that the role of the master was exactly that which appears on the face of the statutory and rules provisions which speak to the duties of the master: he is a judicial officer who presides over full trials, accesses credibility of witnesses, makes findings of fact, rules on the law, and at the end of the trial announces his decision. Indeed, the only action he does not

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6. Both Breed v. Jones and United States v. Jenkins, had already been decided when the Maryland Court of Appeals amended the de novo rule to provide hearings on the record.

take is to sign the final order.[7] The opinion of the court in the habeas cases and the decision below in the instant case confirm the accuracy of this description, and further find that the so-called "review" by the judge of the master's findings is essentially meaningless. The court below correctly concluded:

> Even though the master cannot enter a final order, the adjudicatory hearing still engenders elements of "anxiety and security" in a juvenile and imposes a "heavy personal strain," and the juvenile "is put to the task of marshaling his resources against those of the State." Slip opinion at pp. 8-9.

The Jurisdictional Statement is noticable in its failure to discuss the record developed below. Rather it seeks to emphasize two points: (1) the second hearing before the judge is on the record, and (2) Breed v. Jones is distinguishable because the judicial officer in the first hearing in that case had the power to enter an order whereas the judicial officer in the instant case (the master) does not.[8] As already noted, the first

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7. Indeed, the master even has the power to enter an order detaining a child until his trial. See Rule 911 a.1., Maryland Rules of Procedure.

8. Appellants contend that "the master is not clothed with even a vestige of judicial power...." Jurisdictional Statement at p. 11. From this premise, appellants conclude that jeopardy cannot attach to a hearing presided over by a person (i.e. a master) who has no power. The premise is factually erroneous and the conclusion is wholly illogical. Assuming that the master has no power to enter an order (see fn. 7, supra), he plainly has power to conduct complete trials, make judgments concerning factual and legal issues, and announce his views respecting innocence or guilt at the end of the trial. To conclude that jeopardy never attaches to the trial presided over by the master makes no sense. See Aldridge v. Dean, 395 F.Supp. at 1172, n. 25. Under such reasoning, initial jeopardy would either 1) attach and end simultaneously when the judge affixes his signature to the master's recommendation, 2) end when the judge affixes his signature even though it has never begun, or 3) not end even when the judge signs the order. The first two possibilities are totally illogical. The third possibility, while not illogical, necessarily requires the further conclusion that the child could be prosecuted again and again before a juvenile court judge for the same offense without double jeopardy concepts having any application, and could also be prosecuted at least once in the adult system for the same offense for which he was prosecuted as a juvenile. Such repeated prosecutions, however, are barred by the narrow holding of Breed.

argument is disposed of by United States v. Jenkins, supra, which the Jurisdictional Statement never discusses. The second argument cannot square with either this Court's treatment of the "continuing jeopardy" notion in Breed[9] or with the record in the instant case. Whatever might be said about the role of a master in another context, the record is uncontradicted in demonstrating that juvenile court masters in Maryland play the same role as the juvenile court judge respecting all matters that are relevant to the issue of whether jeopardy attaches. As the court below and the court in the habeas cases recognized, the double jeopardy clause is designed to protect an individual from the strain and risk incident to two trials for the same offense. Those risks take place whether the judicial officer at the first trial is called a master or a judge.[10]

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9. The Jurisdictional Statement thoroughly confuses the relevant law pertaining to "continuing jeopardy" by introducing that concept as it was developed by Mr. Justice Holmes in Kepner v. United States, 195 U.S. 100 (1904). Appellants describe Mr. Justice Holmes' position as one that this Court "has not expressly adopted...." Jurisdictional Statement at p. 11. This is an understatement. Indeed this Court has uniformly rejected the doctrine as defined by Mr. Justice Holmes. The somewhat different doctrine, enunciated in Ball v. United States, 163 U.S. 662 (1896), that permits the retrial of the defendant who has had his first trial reversed on appeal, is based on completely different principles than those suggested by Mr. Justice Holmes. In the appeal situation, the defendant has waived his right to claim double jeopardy protections by affirmatively seeking to overturn the first conviction.

10. Appellants support their position by citing four cases: Bradley v. People, 258 Cal.App.2d 253, 65 Cal. Rptr. 570 (1968); In re Henley, 9 Cal.App.3d 924, 88 Cal.Rptr. 458 (1970); People v. J.A.M., 174 Colo.245, 483 P.2d 362 (1971); Jessie W. v. Superior Court of Mateo County, 133 Cal.Rptr. 870 (Cal.App. 1976). The first three cases were all decided before this Court's opinion in Breed v. Jones, supra, and consequently are of little current value. See slip opinion of the court below, at p. 10. Moreover, the J.A.M. case is distinguishable because the relevant Colorado statute permitted the parties to chose whether the child's case would be commenced before a referee instead of a judge. The court in J.A.M. noted that by chosing to appear before a referee, the juvenile knowingly waived his right to assert the double jeopardy prohibition on the occasion of his rehearing before the judge. See 483 P.2d at 364.

Although the last case cited above, Jessie W. v. Superior Court of Mateo County, was decided by an intermediate California State appellate court after this Court's decision in Breed, the Supreme Court of California granted review; the matter has been argued and is awaiting decision. Under Rules 976(d) and 977, California Rules of Court, a decision by the California Supreme Court to review a lower court opinion supersedes that opinion. The superseded opinion may not be published in the Official Reports or

CONCLUSION

For the foregoing reasons it is respectfully requested that the final judgment of the court below be affirmed.[11]

Peter S. Smith

Adrienne E. Volenik
Maryland Juvenile Law Clinic
500 W. Baltimore Street
Baltimore, Maryland 21201
Counsel for appellees

November, 1977

(fn. 10 cont'd.)

cited by a court or party, except for purposes of law of the case doctrine. Thus Jessie W. has no precedential or persuasive worth in California.

11.

Appellants alternatively urge this Court to summarily reverse. See Jurisdictional Statement at pp. 1, 13. It is settled that summary reversal in an appeal is appropriate only in the clearest of situations. See Stern and Gressman, Supreme Court Practice (4th ed. 1969) at 234. A survey of the October, 1976 Term, reveals only three summary reversals in cases which reached this Court by appeal. One of them was reversed and remanded with instructions to the trial court to consider fully the issues in the case. Concerned Citizens of Southern Ohio v. Pine Creek Conservancy District, 51 L.Ed.2d 116 (1977). Plainly the instant case, decided by a unanimous three-judge panel, does not fall within that small group of decisions which are so obviously incorrect as to justify summary reversal.

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONALD BRADY, et al.,. *

v. * CIVIL NO. Y-74-1291

WILLIAM SNISHER, et al., *

MEMORANDUM AND ORDER

DATE: 9/16/77

PETER S. SMITH, Esq., Attorney for Plaintiffs, Baltimore, Maryland.

BERNARD RAUM, Esq., Assistant Attorney General, Attorney for Defendants, Baltimore, Maryland.

On November 25, 1974 plaintiffs[1] instituted this action against Milton Allen, then State's Attorney for Baltimore City; Howard Merker, Chief of Operations, Office of State's Attorney for Baltimore City; Barbara Daly, Chief Juvenile Court Services Division, Office of State's Attorney for Baltimore City; and James Benton, Deputy Clerk, Circuit Court for Baltimore City, Division of Juvenile Causes, seeking declaratory and injunctive relief, and to enjoin the defendants from subjecting plaintiffs to a second trial or disposition pursuant to Rule 908e 2 and 3, Md. Rules of Procedure, which plaintiffs allege violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. This action is brought pursuant to 42 U.S.C. § 1983 and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1343.

Subsequent to the designation of a three-judge court pursuant to 28 U.S.C. § 2284, plaintiffs filed a request for

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[1] Donald Brady; Michael A. Epps; James Love, a minor by Joyce Love, his mother and next friend; Phillip Witherspoon, a minor by Elsie Witherspoon, his mother and next friend; Joseph Fenwick, a minor by William Beckett, his step-father and next friend; William L. Campbell, a minor by William Campbell, his father and next friend; Andre Aldridge, a minor by Ruth Kent, his mother and next friend; George McLean, a minor by Minnie Johnson, his mother and next friend; and Quinton Stewart, a minor by Haynie Stewart, his father and next friend.

certification as a class. Having found that the numbers of individuals to be joined might prove impracticable, that the requirements of commonality and typicality of law and fact have been met and that the plaintiffs can adequately represent the interests of the class and are represented by competent counsel, that request is granted. Rule 23(a)(1) F.R.Civ.P. The class is designated as a (b)(2) class under Rule 23 F.R.Civ.P. and consists of all juveniles against whom, on or after June 12, 1976, the State of Maryland had filed exceptions to the finding of non-delinquency. This Court has previously granted the motion of Stevie Jacobs, Dennis Green and Steven Stencil to intervene as plaintiffs. The defendants have moved for relief from this order since the exceptions filed by the State's Attorney's Office were later withdrawn. Paul Meadows, on February 20, 1976, and Eugene Fields on May 21, 1976, also moved to intervene as plaintiffs. The Office of the State's Attorney has also withdrawn its exception to the findings and recommendations of the master in Meadows' case. As of the time of final argument before this three-judge panel (June 12, 1976) a rehearing was still pending on the exceptions filed by the Office of the State's Attorney in Fields' case, although the State subsequently withdrew its exception. The motion of Eugene Fields to intervene as a plaintiff will be granted. The motion of Meadows to intervene is denied and the defendants are granted relief from the order granting Jacobs, Green and Stencil leave to intervene.

Pending determination of nine habeas corpus petitions, filed by the original plaintiffs here, the three-judge court stayed consideration of this case. On June 12, 1975 Judge Thomsen granted habeas corpus relief to six of the plaintiffs, but dismissed the petitions of Brady, Epps and Love without prejudice. See, Aldridge v. Dean, 395 F. Supp. 1161 (D.Md. 1975).

On July 17, 1975 the defendants, having been granted leave by the Court to file a supplemental pleading, moved to dismiss the complaint on the ground of mootness since the

Maryland legislature had enacted, effective July 1, 1975, Chapter 554 of the Acts of 1975, Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-813, and the Maryland Court of Appeals amended Chapter 900 of the Maryland Rules of Procedure, to conform the rules to Chapter 554 of the Acts of 1975, as well as the opinion of this Court in Aldridge v. Dean, supra. Former Rule 908e 2 and 3 no longer exists, but has been amended and reenacted as Rule 910e, Md. Rules of Procedure. The plaintiffs were then granted leave to file a supplemental complaint seeking a declaratory judgment that Md. Ann. Code Cts. & Jud. Proc. Art., § 3-813 and Rule 910e, Md. Rules of Procedure, violate the Double Jeopardy Clause of the Fifth Amendment, and an injunction enjoining the defendants, Swisher, the current State's Attorney for Baltimore City, Merker, Sheldon Mazelis,[2] Chief of the Juvenile Division, Office of State's Attorney, Baltimore City, and Benton from taking exceptions to findings of non-delinquency or from taking exceptions to dispositions pursuant to Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-813 and Rule 910e. The defendants' motion to dismiss this supplemental complaint was denied after a hearing on the motion.

The defendants reasserted their argument that this case should be dismissed on the ground of mootness. However, the intervention of Eugene Fields saves this case from becoming moot. At oral argument it was agreed that the State has filed an exception to the master's findings and recommendations and that a hearing has been set before the juvenile judge on the exception. Thus an actual case and controversy exists between the plaintiff, Eugene Fields, and the defendants.

An evidentiary hearing was conducted in the nine habeas corpus cases (Aldridge, supra) at which counsel stipulated that the evidence admitted there would be admissible in this proceeding

[2] This Court has granted plaintiffs' motion to substitute Swisher for Allen and Gault-then Mazelis-for Daly. In his complaint, Fields only seeks relief from Swisher, Gault and Daly.

subject to any objections. This Court conducted a brief evidentiary hearing and counsel have submitted several stipulations and additional documentation. Most of this new evidence brings up to date the statistics introduced in the Aldridge hearing.

A case is generally instituted when the Office of the State's Attorney files a petition which alleges that the "Named child under the age of eighteen years is Delinquent." If the case is filed in Baltimore City after arraignment, it is assigned to either the juvenile judge or one of the seven masters. The presiding juvenile judge in Baltimore City hears the more aggravated type of case, such as murder, rape or armed robbery. He also hears all cases in which the juvenile is represented by the Maryland Juvenile Law Clinic. If the case is assigned to a master, an adjudicatory hearing is held at which the State's Attorney presents his case. Each witness is sworn and subject to direct and cross examination. After the close of the State's case, the defense normally moves for a dismissal of the petition. If the motion is denied, the defense then presents its case. After hearing argument, the master announces his finding to the parties, explaining the reasons for his conclusions. These proceedings are now recorded on tape. If the charges are not sustained, some masters inform the juvenile that the State has a right to take an exception. Others do not so inform the juvenile. Under Rule 910 the master must submit to the juvenile judge a written statement of his proposed findings of fact, conclusions of law and recommendations. However, in most cases the parties agree to waive the master's written proposed findings of fact and conclusions of law. The memoranda are normally submitted to the juvenile judge when the master has recommended commitment or detention.

Since the new rules became effective July 1, 1975, the juvenile judge has always signed the proposed order where the master has made a finding that the charge was not sustained

and the State does not take an exception, even though the judge may hold another hearing on his own motion. If an exception is taken, the matter is set for a hearing before the juvenile judge. If the State is the objecting party, the hearing must be on the record unless the juvenile assents to the introduction of evidence. In recent years the State has filed few exceptions to the findings of a master.

The legal issue, and only issue, presented in this case is whether the defendants are barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, see Benton v. Maryland, 395 U.S. 784 (1969), from taking exceptions to findings and recommendations of a master pursuant to Md. Ann. Code, Cts. & Jud. Proc. art., § 3-813, and Rule 910e, Md. Rules of Procedure, in order to obtain a different resolution by the juvenile judge.

Md. Ann. Code, Cts. & Jud. Proc. art., § 3-813 provides:

> (a) The judges of a circuit court, and the Supreme Bench of Baltimore City, may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals. The standards expressed in § 3-803, with respect to the assignment of judges, shall also be applicable to the appointment of masters. A master must, at the time of his appointment and thereafter during his service as a master be a member in good standing of the Maryland Bar. This subsection shall not apply to a master appointed prior to June 1, 1971, who is approved by the judge of the circuit court exercising juvenile jurisdiction.
> (b) If a master is appointed for juvenile causes, he is authorized to conduct hearings. These proceedings shall be recorded, and the master shall make findings of fact, conclusions of law, and recommendations as to an appropriate order. These proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served upon each party to the proceeding.
> (c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing de novo or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.
> (d) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court. They shall be promptly reviewed by the court; and in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them.
> (e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them it shall conduct a de novo hearing. However, if all parties and the court agree the hearing may be on the record.

Rule 910e provides:

> Upon the filing of exceptions, the judge shall instruct the clerk to schedule a hearing on the exceptions. A party who files exceptions, other than the State, may elect a hearing de novo or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. Either hearing shall be limited to those matters to which exceptions have been taken.

Clearly these two provisions conflict. The statute permits a de novo hearing if the party taking an exception requests one or if the court, on its own motion, decides not to adopt the master's findings. However, the rule provides that a hearing on exceptions filed by the State must be on the record and not de novo unless the juvenile raises no objection. Under

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[3] Rule 910e was amended, effective January 1, 1977, and the clauses at issue in this case are now incorporated, without substantive changes, in Rule 911c Md. Rules of Procedure, paragraph 2:

> Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing de novo or a hearing on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

Reference to the section is made in the remainder of the body of this opinion as Rule 910e [Rule 911c].

Maryland case law, a rule which conflicts with a statute will prevail if it was adopted subsequent to the passage of the statute and is within the rule-making power of the Maryland Court of Appeals. See County Fed. S. & L. v. Equitable Sav. & Loan, 261 Md. 246, 253 (1971). Here both the statute and the rule became effective on July 1, 1975; however, the rule was approved and adopted by the Court of Appeals after the statute was signed into law. At oral argument counsel agreed that the rule controls. Thus this Court need only discuss the provisions of the rule.

Resolution of the legal issue must consider two questions: (1) Whether the adjudicatory hearing before the master is a jeopardizing proceeding and (2) If so, whether the proceeding bars any further adjudication by the judge of the Juvenile Court. See Breed v. Jones, 421 U.S. 519 (1975); Whitebread & Batey, Juvenile Double Jeopardy, 63 Geo. L.J. 857 (1975).

The decisions of the Supreme Court in Breed and of Judge Thomsen in Aldridge clearly establish that jeopardy attaches when the State begins to offer evidence in an adjudicatory hearing before a master. In Breed the Court stated:

> We believe it simply too late in the day to conclude...that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years***.
> As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." United States ex rel Marius v. Hess, [317 U.S. 537] at 548-549. Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens--psychological, physical, and financial--on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offense." [Citation omitted.]***
> Thus in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of "'anxiety and insecurity' in a juvenile, and imposes a 'heavy personal strain.'" [Citation omitted.]
> *** We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was "put to trial before the trier of facts," [Citation omitted], that is, when the Juvenile Court, as the trier of the facts, began to hear evidence.

Breed v. Jones, 521 U.S. at 529-531. Judge Thomsen, quoting this same language, concluded in Aldridge at 1172, "A juvenile is placed in jeopardy when the state begins to offer evidence in an adjudicatory hearing before a master." A similar conclusion was reached in Brenson v. Havener, 403 F. Supp. 221 (N.D. Ohio 1975).

Despite these decisions, the defendants, relying on Matter of Anderson, 272 Md. 85 (1974), argue that jeopardy does not attach when the State begins to offer evidence in an adjudicatory hearing before a master, but only when the master transmits his recommended findings to the juvenile judge. The Court of Appeals of Maryland in Matter of Anderson, supra, stated that the role of a master is only advisory and that a master has no judicial power. Defendants argue that since a master cannot enter a final order in the case, a juvenile is not placed in jeopardy when he appears before the master, thus distinguishing Breed where the juvenile originally appeared before a juvenile judge who had the power to enter a final order, if he so chose. The defendants in adopting this argument overlook the clear language in both Breed and Aldridge. Even though the master cannot enter a final order, the adjudicatory hearing still engenders elements of "anxiety and insecurity" in a juvenile and imposes a "heavy personal strain," and the juvenile

is put to the task of marshaling his resources against those of the State." Aldridge at 1173. The changes in the proceedings before a master, caused by the adoption of Rule 910, [Rule 911] do not alter the conclusion that jeopardy attaches when the State begins to offer evidence before a master in an adjudicatory hearing. That hearing is similar to a court trial in a criminal case. The State first presents its case by calling witnesses who are sworn and subject to cross-examination by the juvenile's counsel. If the juvenile's motion for a directed verdict is denied, then he may put on his case. Clearly jeopardy attaches at such a proceeding when the State begins to offer evidence before the master, the trier of facts.

Having determined that jeopardy attaches when the master begins to hear evidence, it must next be determined if a juvenile is placed twice in jeopardy when the defendants here take an exception to the findings of a master pursuant to Rule 910e [Rule 911c]. In analyzing the constitutionality of the procedures permitted by Rule 910e [Rule 911c], two issues must be considered: (1) Whether "continuing jeopardy" applies to this situation and (2) Whether the rehearing on the record before the juvenile judge is justified by interests of society, reflected in the juvenile court system, or by interests of the juveniles themselves. See Breed v. Jones, supra, at 534-535.

Besides the courts in Aldridge, Brenson and Matter of Anderson, two state courts have faced the application of the Double Jeopardy Clause to review by a juvenile court judge of a master's findings. In Bradley v. People, 65 Cal. Rptr. 570 (Ct. App. 1968), the California Court of Appeals, stressing the "conditional nature of a referee's order," found nothing in

the applicable provisions of the Juvenile Court Law, permitting a de novo review of a referee's order, which offended the Fifth and Fourteenth Amendments. Bradley at 575. Later, in following this holding in another case, the California Court of Appeals stressed that in Bradley "the determinative factor ... was the limited nature of the powers of a referee." In Re Henley, 88 Cal. Rptr. 458, 461 (Ct. App. 1970).

In People v. J.A.M., 174 Col. 245 (1971) (en banc), the Colorado Supreme Court held that a second hearing before the juvenile judge, following a referee's finding that the evidence was not sufficient to sustain the petition in delinquency, did not place the juvenile twice in jeopardy. The court stated:

> Under the provisions [of the statute], the findings and the recommendations of the referee do not have the effect of a final judgment until adopted or modified by the court.
>
> We are not here dealing with two separate proceedings, one before the referee and a second before the court, but rather with one proceeding to pass on the question of possible delinquency.

People v. J.A.M., supra, at 248-249.

Both cases were decided before the Supreme Court considered Breed v. Jones and contain language indicating that the Double Jeopardy Clause did not apply to juvenile proceedings. Thus, in light of Breed, these cases might be decided differently today.[4] Bradley turns on the theory that jeopardy does not

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[4] Since the submission of final briefs in this case, counsel for the defendants has brought to the Court's attention two recent California cases concerned with review by juvenile court judges of referee's decisions. In Jesse W. v. Superior Court of Mateo County, 133 Cal. Rpt. 870 (1976), the court persisted in finding, as had the courts in the pre-Breed cases, that the subordinate judicial powers of the referees made their determination non-adjudicatory and that therefore there was a "continuing" jurisdiction over a case assumed by the juvenile court judge. "Presiding" power was held not to be the equivalent of "decisional" power. Jesse W. does not, in the opinion of this Court, square with the teaching of Breed, and the California
(Continued on next page)

attach at a hearing before a referee; however, this Court, with the advantage of the Supreme Court's language in Breed, has already determined that jeopardy does attach at a hearing before a master. The Colorado court's theory of "continuing jeopardy" constituting only one proceeding has been criticized. See Whitebread & Batey, Juvenile Double Jeopardy, 63 Geo. L. J. 857, 878 (1975). The same result is unlikely today in light of the statement in Breed that "...the fact that the proceedings against respondent had not 'run their full course' [Citation omitted], within the contemplation of the California Welfare and Institutions Code, at the time of transfer, does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial." Breed at 534. Thus, these cases are of little precedential value to this Court.

Several policies underlie the double jeopardy prohibition. The policies which most concern this Court now were best stated by Justice Black in Green v. United States, 355 U.S. 184, 187-188 (1957).

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.*** The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to

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4(Continued from page 10)
court's holding that even though jeopardy attaches at the referee's hearing it is somehow of less than constitutional magnitude seems to be in error. Counsel for plaintiff in the instant case has informed this Court that Jesse W. is on appeal to the Supreme Court of California and thus is of little persuasive value. A second case, In re Anthony M., 64 Cal. App. 3d 464 (1976), does not even cite Breed and is clearly concerned with the impact of a juvenile's request for a rehearing, to which he is entitled as a matter of state law in California. Although there is, at 543, general language alluding to the subordinate status of the referee's opinion, the focus of the court's concern is upon the validity of a juvenile court's assessing a more severe penalty upon the rehearing of the juvenile's case.

> embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

A third policy relevant here is that the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges. See Comment, Twice in Jeopardy, 75 Yale L.J. 262, 266-67, 277-78 (1965). Here, the defendants can take an exception under Rule 910e [Rule 911c] to a recommended disposition of probation to argue for detention before the juvenile judge.

The defendants have argued that jeopardy does not terminate with the submission of the proposed findings and recommendations by the master to the judge, but rather continues until the trial court is able to make an adjudication. In the past the concept of "continuing jeopardy" has only been applied in cases in which the defendant has successfully obtained a second trial. See Jones v. Breed, 497 F.2d 1160, 1167 (9th Cir. 1974). In recent years the Supreme Court has dealt with double jeopardy cases where the Government has taken an appeal. In United States v. Wilson, 420 U.S. 332, (1975), the Government appealed the grant of a postverdict motion for dismissal after the jury had entered a guilty verdict. However, the Third Circuit Court of Appeals barred review of the District Court's ruling on the ground of double jeopardy. The Supreme Court reversed on the ground that the constitutional protection against Government appeals attaches where there is danger of subjecting the defendant to a second trial for the same offense. There was no such danger in Wilson because, if the District Court's ruling was overturned, the jury verdict could simply be reinstated. Although the Court permitted the Government to appeal in such situations, the Court stated:

> ...we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to reexamine the weaknesses in his first presentation in order to strengthen the second; and it would disservice the defendant's legitimate interest in the finality of a verdict of acquittal.

United States v. Wilson, supra at 352.

The same day the Court ruled in Wilson it announced its decision in United States v. Jenkins, 420 U.S. 358 (1975). There, after a bench trial, the District Court "dismissed" the indictment and "discharged" the respondent. The Second Circuit dismissed the Government's appeal "for lack of jurisdiction on the ground that the Double Jeopardy clause prohibits further prosecution." Since the Court was unsure whether the District Court had based its decision on a determination of facts or on a resolution of a legal question, Wilson could not govern the case. The Court concluded:

> ...[I]t is enough for purposes of the Double Jeopardy Clause...that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further proceedings at this stage would violate the Double Jeopardy Clause...

United States v. Jenkins, supra at 370.

Thus the defendants' contention that there is no violation of the Double Jeopardy Clause because the jeopardy continues until a final adjudication by the judge must be rejected. This concept has never been accepted by the Supreme

Court in this context. Review by the juvenile judge would require more than the mere reinstatement of a finding of delinquency; it would require supplemental findings by the judge. The defendants' argument is basically that under the statutory scheme the hearing before the master and the later review by the juvenile judge are part of one continuing proceeding. The Supreme Court has stated that such an argument "does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial." Breed v. Jones, supra at 534.

The argument that the hearing before the juvenile judge may only be on the record and not de novo does not alter the inescapable conclusion. The most important element is that the State has more than one opportunity to convince a trier of fact of the guilt of the juvenile. In Jenkins, supra, the Supreme Court found that the Double Jeopardy Clause would be violated even if no additional evidence were to be taken by the trial court. Jenkins at 370. Interestingly in Breed the case in the adult criminal court was "submitted to the court on the transcript of the preliminary hearing." Breed at 525. Thus, it is not the taking of additional evidence or the conducting of a de novo hearing that violates the Double Jeopardy Clause; it is the subjecting of the juvenile to a second proceeding at which he must once again marshal whatever resources he can against the State's and at which the State is given a second opportunity to obtain a conviction. Merely declaring that the two proceedings are one does not answer these intrusions upon the policies of the Double Jeopardy Clause.

Although Rule 910e [Rule 911c] violates the Double Jeopardy Clause, this Court must consider if giving the juvenile the constitutional protection against multiple trials in this context will diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the juvenile

court system. See Breed v. Jones, supra at 535. The defendants have offered no explanation of how the master system fosters the flexibility and informality of the juvenile court system. They do assert that if the master system is struck down by this Court that the case load would be too burdensome for the only juvenile judge currently sitting in Baltimore City. The Report of the Committee on Juvenile and Family Law and Procedure to the Maryland Judicial Conference (1976) recommends that the juvenile master system be eliminated and that all juvenile proceedings requiring judicial attention be handled by a juvenile court judge. The Report stated in part: "No longer can we, the Judiciary, tolerate the treatment of juvenile justice as the 'step child' of the courts. The problems of juvenile justice have too great an impact on the quality of life in the state and future criminal behavior in general to be shunned and ignored as something beneath the dignity of a judge." Thus, the master system not only does not foster any of the goals of the juvenile court system, it may be a detriment. See also Final Report of the Commission on Juvenile Justice to the Governor and the General Assembly of Maryland, January 1, 1977.

Another factor to be considered in deciding whether a constitutional right should be applied to juvenile proceedings is the recommendations of various studies and model acts dealing with the juvenile court system. See In Re Gault, 387 U.S. 1 (1967); Rudstein, Double Jeopardy in Juvenile Proceedings, 14 Wm. & Mary L. Rev. 266, 275 (1972).

There are three pieces of model legislation in the area of juvenile law: the Standard Juvenile Court Act, prepared by the Committee on the Standard Juvenile Court Act of the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the Children's bureau (6th Ed. 1959), hereinafter "Standard Act";

the Uniform Juvenile Court Act, approved by the National Conference of Commissioners on Uniform State Laws (1968), hereinafter "Uniform Act"; and Model Act for Family Courts and State-Local Children's Programs, prepared by the Office of Youth Development of the Department of Health, Education, and Welfare (1975), hereinafter "Model Act". Section 7 of the Standard Act provides in part, "The judge may direct that any case...shall be heard in the first instance by a referee...but any party may, upon request, have a hearing before the judge in the first instance." Any party may then file with the judge a request for review of the referee's findings and recommendations. Section 7(b) of the Uniform Act provides: "The judge may direct that hearings in any case or class of cases be conducted in the first instance by the referee in the manner provided by this Act. Before commencing the hearing the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party objects the hearing shall be conducted by the judge." Again any party may request a rehearing by the judge. Section 4(b) of the Model Act provides:

> Delinquency and neglect hearings shall be conducted only by a judge if:
>
> (1) The allegations set forth in the neglect or delinquency petition are denied;
>
> (2) The hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or
>
> (3) A party objects to the hearing being held by a referee.
>
> Otherwise, the [judge] may direct that hearings in any case or class of cases shall be conducted by a referee in the manner provided by this (act).

Any party shall receive a hearing if he requests one.

The differences between these model laws and Maryland's statutory scheme are obvious. All the model acts permit any party to have the case heard in the first instance by the judge. Rule 910e [Rule 911c] of the Maryland Rules of Procedure does

not permit this right. The Model Act, which is the most recent of the model legislation, also takes away from the referee or master delinquency and neglect hearings if the allegations set forth in the neglect or delinquency petitions are denied. Thus, the master would only hear routine matters that do not require the qualifications of a judge. These model pieces of legislation do not deter the extension of the constitutional prohibition against double jeopardy to juvenile proceedings.

Accordingly, it is this 16th day of September, 1977, by the United States District Court for the District of Maryland, ORDERED:

1. Md. Ann. Code Cts. & Jud. Proc. Art. § 3-813 and Rule 910e (Rule 911c) Md. Rules of Procedure are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge or (b) to a juvenile court master disposition, and seek a new disposition before the juvenile court judge; and

2. Defendants, their agents, employees, persons acting in concert with them, and their successors in-office are enjoined from taking exceptions to findings of non-delinquency or from taking exceptions to disposition pursuant to Md. Ann. Code Cts. & Jud. Proc. Art. § 3-813 and Rule 910e, Rule 911c, Md. Rules of Procedure.

Harrison L. Winter
United States Circuit Judge

United States District Judge

United States District Judge

ATTACHMENT B

Rec'd 9-21-77

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONALD BRADY; MICHAEL A. EPPS; JAMES LOVE, a minor by JOYCE LOVE, his mother and next friend; PHILLIP WITHERSPOON, a minor by ELSIE WITHERSPOON, his mother and next friend; JOSEPH FENWICK, a minor by WILLIAM BECKETT, his stepfather and next friend; WILLIAM L. CAMPBELL, a minor by WILLIAM CAMPBELL, his father and next friend; ANDRE ALDRIDGE, a minor by RUTH KENT, his mother and next friend; GEORGE McLEAN, a minor by MINNIE JOHNSON, his mother and next friend; QUINTON R. STEWART, a minor by HAYNIE STEWART, his father and next friend

v.

Civil No. Y-74-1291

WILLIAM SWISHER, State's Attorney for Baltimore City; HOWARD MERKER, Chief of Operations, Office of State's Attorney for Baltimore City; SHELDON MAZELIS, Chief, Juvenile Court Services Division, Office of State's Attorney for Baltimore City; JAMES BENTON, Deputy Clerk, Circuit Court for Baltimore City, Division for Juvenile Causes

JUDGMENT

In accordance with the Memorandum and Order of the Honorable Harrison L. Winter, United States Circuit Judge, the Honorable Edward S. Northrop, United States District Chief Judge, and the Honorable Joseph H. Young, United States District Judge, filed September 16, 1977 in the above entitled case, it is

ORDERED AND ADJUDGED:

1. That Md. Ann. Code Cts. & Jud. Proc. Art. Sec. 3-813 and Rule 910e (Rule 911c) Md. Rules of Procedure are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge, or (b) to a juvenile court master disposition, and seek a new disposition before the juvenile court judge.

2. That defendants, their agents, employees, persons acting in concert with them, and their successors in office are enjoined from taking exceptions to findings of non-delinquency or from taking exceptions to disposition pursuant to Md. Ann. Code Cts. & Jud. Proc. Art. Sec. 3-813 and Rule 910e, Rule 911c, Md. Rules of Procedure.

Dated at Baltimore, Maryland this 19th day of September, 1977.

PAUL R. SCHLITZ, Clerk

BY: R. Bruce McElhone
R. Bruce McElhone
Deputy Clerk

APPPOVED this 19th day of September, 1977.

Joseph H. Young
United States District Judge